fendant actually appreciates the situation and negligently fails to avoid the accident. *Cavanaugh* v. *Boston & Maine R. Co.*, 76 N. H. 68, 79 Atl. 694; *Harrington* v. *Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15; *Kelley* v. *Chicago, B. & Q. R. Co.*, 118 Ia. 387, 92 N. W. 45. The plaintiff's own ability to prevent the injury makes it impossible to reach this result on any correct theory of "last clear chance." *Butler* v. *Rockland, T. & C. St. Ry. Co.*, 99 Me. 149, 58 Atl. 775; *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 84 Atl. 301, 524. Of course, if the defendant's conduct were wilful or wanton, contributory negligence would be immaterial. *Aiken* v. *Holyoke Street Ry. Co.*, 184 Mass. 269, 68 N. E. 238. But when the defendant is merely negligent with reference to the danger, even when seen, the only ground for recovery appears to be that of the two concurrent negligences, the defendant's is the more culpable. This revival of the discredited doctrine of comparative negligence, if it is to be accepted at all, must certainly be limited, as in the principal case, to situations where the danger is actually seen by the defendant. For where both parties are merely inattentive, the comparison cannot be unfavorable to the defendant. Even in this form, however, the doctrine is a serious encroachment upon the defense of contributory negligence.

CORPORATIONS — CAPITAL, STOCK AND DIVIDENDS — RIGHT OF PREFERRED STOCKHOLDERS TO OBJECT TO EXTRAORDINARY DIVIDENDS.— The defendant corporation declared an extraordinary dividend on common stock from the proceeds of the sale of certain assets. Preferred stock was entitled to only four per cent dividends. The plaintiff, a preferred stockholder, seeks to enjoin the distribution as dividends on the ground that these assets were capital. *Held*, that the dividends are proper. *Equitable Life Assurance Society* v. *Union Pacific R. Co.*, N. Y. L. J. 25 (N. Y. Sup. Ct., April 2, 1914).

If dividends are proper, the directors have discretion whether to declare any or not. *McKean* v. *Biddle*, 181 Pa. 361, 37 Atl. 528; *Field* v. *Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126. It is generally stated that dividends cannot be paid out of capital, but only out of profits. See *In re Exchange Banking Co.*, 21 Ch. Div. 519, 526; *Painesville & Hudson R. Co.* v. *King*, 17 Oh. St. 534, 541. But to make the propriety of dividends depend on what might be called capital, and what profits, under various systems of bookkeeping, would be inexpedient. Hence the test actually adopted seems to be that, except for mining and similar corporations, dividends are proper when the assets of the company exceed the liabilities including outstanding stock. *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. Div. 198; *Hazeltine* v. *Belfast & Moosehead Lake R. Co.*, 79 Me. 411, 10 Atl. 328. Dividends may be issued from this surplus whether it comes from income or sales of property increased in value. *Hazeltine* v. *Belfast & Moosehead Lake R. Co.*, *supra*; *Lubbock* v. *British Bank of South America*, *supra*. See *Mackintosh* v. *Flint & P. M. R. Co.*, 34 Fed. 582, 605. The rights of preferred and common stockholders *inter se* depend on the articles of association. *Elkins* v. *Camden & Atlantic R. Co.*, 36 N. J. Eq. 233; *Scott* v. *Baltimore & Ohio R. Co.*, 93 Md. 475, 49 Atl. 327. In the principal case the articles of association provided that the preferred stock should have no share in the "profits" above four per cent. This language would seem to require the same construction here as when used by the courts in determining the propriety of dividends. On winding up a corporation, it has been held that in the absence of express provision, the assets will be distributed equally between preferred and common shareholders. *Sumrall* v. *Commercial Building Trusts*, 106 Ky. 260, 50 S. W. 69; *In re North West Argentine Ry. Co.*, [1900] 2 Ch. 882. How the articles of association in the principal case would be construed as regards the division of assets in such a situation, is doubtful. But as the principal case concerned dividends, the decision seems clearly correct.